

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs May 15, 2007

DAVID LAMAR HAYES v. STATE OF TENNESSEE

Appeal from the Criminal Court for Rutherford County
No. F-58103 Don R. Ash, Judge

No. M2006-01044-CCA-R3-PC - Filed June 27, 2007

The petitioner, David Lamar Hayes, pro se, appeals as of right from the Rutherford County Criminal Court's denial of post-conviction relief. The petitioner was convicted of thirteen counts of rape of a child and seven counts of rape and received an effective sentence of 220 years. On direct appeal, this court affirmed all of the convictions except for one count of rape, which was dismissed, and reduced his total effective sentence to sixty-six years. State v. David Lamar Hayes, M2002-01331-CCA-R3-CD, 2004 WL 1778478 (Tenn. Crim. App. Aug. 9, 2004), perm. app. denied (Tenn. May 23, 2005). On January 10, 2006, the petitioner filed a petition for post-conviction relief that alleged a wide range of allegations regarding ineffective assistance of counsel and state misconduct. After numerous amendments, the appointment of counsel and a full and thorough evidentiary hearing, the post-conviction court denied post-conviction relief. In this appeal, he contends that the post-conviction court erroneously denied relief. Following our review, we affirm the judgment of the post-conviction court.

Tenn. R. App. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and ROBERT W. WEDEMEYER, JJ., joined.

Andrew Messick (at evidentiary hearing), for appellant, David Lamar Hayes, Pro Se (on appeal), Whiteville, Tennessee.

Robert E. Cooper, Jr., Attorney General & Reporter; Preston Shipp, Assistant Attorney General; William C. Whitesell, Jr., District Attorney General, and J. Paul Newman, Assistant District Attorney General, for appellee, State of Tennessee.

OPINION

The petitioner was convicted of thirteen counts of rape of a child and seven counts of rape related to offenses involving the daughter of his live-in girlfriend of six years. The offenses occurred over a ten month period beginning when the victim was twelve years old and continuing after her thirteenth birthday on July 20, 1999. On January 1, 2000, while visiting family out of state with her mother and away from the petitioner, the victim told her mother about the offenses. Her mother immediately returned to Nashville and took the victim to a local emergency room, where doctors learned that the victim was “at [an] advanced stage of . . . pregnancy.” Hayes, slip op. at *2. The victim’s parents sought an out-of-state abortion and genetic testing on the fetal DNA indicated that there was a “99.99997 percent probability” that the petitioner was the father of the child. Id. The victim testified at trial that the defendant forced her to have sex with him for several months before and after her thirteenth birthday. The victim, her mother, her father and step-mother all testified that the victim’s birthday was July 20, 1986. A certified copy of the victim’s birth certificate was admitted into evidence as well. At trial, the petitioner admitted to having sex with the victim but insisted that the relationship was consensual, that the victim was older than thirteen years of age, that all of the state’s witnesses had lied regarding her age and that the birth certificate was a forgery.

On direct appeal, the petitioner challenged the sufficiency of the evidence and the propriety of the sentence. This court found insufficient proof of one count of rape alleged to have occurred in October of 1999 because the testimony at trial indicated only a single offense during that time period. However, we concluded that the proof of all remaining convictions was sufficient. This court also reduced the effective sentence from 220 years to sixty-six years based upon the conclusion that the sentence imposed by the trial court “far exceed[ed] that allowed under our general sentencing principles” and that “an effective sixty-six year sentence is justly deserved and no greater than that deserved for these offenses.” Hayes, slip op. at *10.

On January 10, 2006, the petitioner filed his pro se petition for post-conviction relief. The petitioner filed multiple pro se amendments and titled the pleadings such things as “Post-Conviction Affidavit of Specific Negative Averments,” “Post-Conviction Bill of Particulars,” and other pleadings unique to his collateral litigation, but the general claim of the more than two hundred pages of pro se pleadings centers around the petitioner’s allegations of ineffective assistance of counsel and state misconduct regarding the alleged fraudulent birth certificate admitted at his trial. After appointment of counsel and an additional amendment to the petition, an evidentiary hearing was held wherein the petitioner and trial counsel testified regarding the allegations of the petition.

The petitioner testified at the evidentiary hearing that his trial counsel committed ineffective assistance by failing to interview or subpoena witnesses at trial. He stated that he gave trial counsel a list of witnesses who could provide beneficial information but that none of them testified at trial. He claimed that people with whom he had worked would have testified that the victim called him often at work and could have provided him with an alibi regarding the offenses. When asked for specific names of witnesses and the substance of their expected testimony, the petitioner replied that he could not remember any details and that many of them may have died since the trial. The

petitioner claimed that trial counsel was ineffective in failing to seek independent DNA testing of the fetal DNA evidence to refute the state's evidence that he was the father of the victim's child. The petitioner also claimed that trial counsel was ineffective in not challenging the admission of the birth certificate, which he claims is a forgery because it is handwritten. Covering more than one hundred pages of transcript at the evidentiary hearing, the petitioner read from his numerous pleadings with little evidence or testimony offered in support of his claims.

The petitioner's trial counsel testified that the petitioner admitted to having sex with the victim. He stated that he told the petitioner that "the proof that the state had was fairly overwhelming and the DNA evidence was pretty much [i]ncontrovertible and he needed to make a plea." Trial counsel testified that the petitioner believed that the victim would not appear to prosecute him. Despite his best efforts to advise the petitioner, trial counsel was unable to convince him to accept a plea offer and described the petitioner as "just [having] an unrealistic view of the case and what the evidence would show and what the victim would say when she took the stand."

Trial counsel testified that he fully and independently investigated the authenticity of the victim's birth certificate by inquiring with the Alabama Department of Vital Statistics. He stated that he was satisfied with the authenticity of the birth certificate. He testified that the one presented at the evidentiary hearing was identical to the one admitted at trial. He stated that the court denied independent DNA testing of the fetal material at state expense because the petitioner was not indigent. He explained to the petitioner that independent testing "was not going to do any good" and that he did not advise testing it at the petitioner's own expense.

Trial counsel recalled that the main issue of the trial was the petitioner's claim that the birth certificate was a forgery and that the victim was actually older than thirteen. He testified that the petitioner had a problem with the birth certificate being handwritten and has "always said that it's a forgery, that that's not the way they do it in Alabama. But it's apparent to me that is the way they do it in Alabama." He further stated that the petitioner "[j]ust kept saying that the victim was a manipulative person. She was really older than her years. And that she manipulated him into having sex with her. And if there was ever any evidence to that fact, I never discovered it."

Trial counsel testified that he kept notes on the five witnesses the petitioner wanted to utilize as witnesses at trial. Trial counsel stated that one witness, Deanna Eaton (the petitioner's sister), did not want to testify. He recalled that Terry Jackson could not testify to any relevant facts, but the petitioner wanted him called to testify that the petitioner had supported his family financially. Another witness, Steve Johnson, was a coworker and did not want to testify for the petitioner. The petitioner contended that Danisha Jackson, another coworker, could provide an alibi for the offenses because she could testify regarding when the petitioner was at work. Trial counsel stated that his investigation revealed that he could not establish an alibi defense because the offenses occurred numerous times over the course of several months and not when the petitioner claimed to have been at work. Regarding the uncalled witnesses, trial counsel testified that "there was absolutely nobody that wanted to come testify for Mr. Hayes" and that "there was nobody actually that I could get to come that he suggested."

Appellate counsel began representation of the petitioner after trial but before sentencing. He testified that he became concerned with the petitioner's competency but that he refused to cooperate with an evaluation so the sentencing went forward and the petitioner ultimately received an effective sentence of 220 years from the trial court. Appellate counsel successfully argued that the petitioner's sentence was excessive and this court modified the sentence to sixty-six years. The post-conviction court commented regarding appellate counsel's performance:

What happened on that was I sentenced you to 235 years, which I still think was right by the way. The Court of Appeals said no, that you should get 65 years at 100 percent. So I deferred to my brothers and sisters on the Court of Criminal Appeals though. [Appellate counsel] did a good job there for you. He saved you about 170 years.

The petitioner testified in rebuttal at the evidentiary hearing and claimed that he never received various items of discovery prior to trial and that the post-conviction hearing was the first time those items had been produced. He also contended that the victim was not even living in Tennessee during the summer when some of the rapes were alleged to have occurred. When confronted with the certified copy of the victim's birth certificate at the post-conviction hearing the petitioner persisted in his belief that it was a forgery and that it did not contain a seal "that could be recognized as from the state of Alabama. Nor any seal to be recognized from anywhere."

At the conclusion of the evidentiary hearing, the post-conviction court found that the petitioner's attorneys were not deficient in their representation. The post-conviction court stated that "[i]n fact based upon the testimony I've heard their performance was above average." The post-conviction court went further to rule regarding the prejudice prong of the ineffective assistance of counsel claim. In discussing the prejudice prong in this case, the following exchange occurred between the post-conviction court and the petitioner:

THE COURT: . . . In this case based upon the testimony of Mr. Hayes himself he had sex with this child. His entire defense seems to be based upon this birth certificate that's certified that says this child was under 12 or 12 at the age –

THE DEFENDANT: Your honor, is it certified? I can't see it.

THE COURT: It is. It's got a seal on it.

THE DEFENDANT: What type of seal? What do[es] it state?

THE COURT: It's got a – you can feel it right here and feel the seal. It says state of Alabama and it says certified. You and I can disagree about it. We disagree. I think it's certified. You can have your opinion. I've got mine.

THE DEFENDANT: I don't see the seal, Your Honor. The seal is not –

THE COURT: I disagree. I see the seal. It's right there and I can feel it.

THE DEFENDANT: Do[es] the seal say the state of Alabama?

THE COURT: It's got little tiny print that says state of Alabama up and down and all over this thing here. So it just does. But you and I can disagree about that. So based upon the presentation made today, and [post-conviction counsel], I

appreciate your work on this. I can tell you spent a lot of time involved in it. You let Mr. Hayes put on his proof and talk all he wanted to. So I appreciate your efforts in representing this gentleman.

I'm going to find that Mr. Hayes has failed to carry his burden in this and that . . . his request for post conviction relief is denied.

It is apparent to this court that the main issue that the petitioner continues to argue centers around his mistaken belief that the birth certificate used as evidence of the victim's age was a forgery.

ANALYSIS

We initially note that the pro se petitioner filed a timely notice of appeal, thereby initiating the process of challenging the post-conviction court's denial of his petition for post-conviction relief. The mere filing of a notice of appeal does not, standing alone, properly perfect the issues on appeal for this court's review. There are specific requirements regarding the record on appeal and the content of briefs to the appellate courts. See, generally, Tenn. R. App. P. 24 - 30. Furthermore, this court's rules provide that inadequate briefs may be stricken with the imposition of costs to the party responsible for the filing of a brief that does not comply with the Tennessee Rules of Appellate Procedure. Tenn. Ct. Crim. App. R. 10(a). Similarly, the same rule allows this court to treat as waived any issues that "are not supported by argument, citation to authorities, or appropriate references to the record." Tenn. Ct. Crim. App. R. 10(b). We note that the petitioner refused appointed counsel to represent him on appeal. A litigant proceeding pro se must follow the applicable procedures for perfecting an appeal. This court cannot and will not act as the petitioner's attorney.

The petitioner's brief consists of seventy-six pages of largely incoherent rambling from which we are unable to discern any argument, legal or otherwise, relevant to his appeal of the post-conviction court's finding that the petitioner was well-represented at trial and was not subjected to prosecutorial misconduct. Rather than attempt to summarize or paraphrase the incomprehensible allegations of his brief before this court, we find the following to be illustrative of the overall nature of his brief:

The standard provided in the appellant case hangs upon the displayed use of "any" and "a" rational trier of facts determining which standard of proof the burden of proof, has and will be raised as well as presented that a verdict as a matter of Constitutional Guarantee, protection, and secured of the 4th, 5th, 6th and 14th Amendment and Mandatorily requires. This provides the Honorable Courts light upon the threshold standard to be placed the State to prove it's case, and being the burden by the production and the burden of persuasion at which pivots the standard of proof.

We are able to discern from the brief that the petitioner submits three issues for our consideration. The first two challenge this court's determinations on direct appeal relative to the sufficiency of the evidence and the allegedly unconstitutional reliance upon Jackson v. Virginia, 443

U.S. 307, 319 (1979), as the standard for reviewing sufficiency of the evidence claims. Neither issue is appropriate for our review because the sufficiency of the evidence has been previously determined on direct appeal and the constitutional attack on the standard of review was not addressed at the trial court level. See Tenn. Code Ann. § 40-30-106(g) and (h). Furthermore, neither issue has merit.

In his third allegation, the petitioner contends that the post-conviction court abused its authority in denying relief. While most of the brief is wasted on loosely-termed argument regarding issues one and two, the argument regarding the propriety of the post-conviction court's denial of post-conviction relief covers only five pages and reveals various standards for competent and effective counsel. However, rather than setting out any factual examples of the failings of trial counsel, the petitioner concludes his brief with yet another paragraph that in no understandable way addresses the ruling of the post-conviction court. Therefore, we shall review the propriety of the post-conviction court's denial of post-conviction relief based upon a thorough review of the record and the long-applied standards so familiar to post-conviction litigation.

The burden in a post-conviction proceeding is on the petitioner to prove his grounds for relief by clear and convincing evidence. Tenn. Code Ann. §40-30-110(f). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457.

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see Lockart v. Fretwell, 506 U.S. 364, 368-372, 113 S. Ct. 838, 842-44 (1993). In other words, a showing that counsel's performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, "the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. 2068. The Strickland standard has been applied to the right to counsel under Article I, Section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

A petitioner will only prevail on a claim of ineffective assistance of counsel after satisfying both prongs of the Strickland test. See Henley v. State, 960 S.W.2d 572, 580 (Tenn. 1997). The performance prong requires a petitioner raising a claim of ineffectiveness to show that the counsel's representation fell below an objective standard of reasonableness or "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. The prejudice prong requires a petitioner to demonstrate that "there is a reasonable probability that, but for counsel's professional errors, the result of the

proceeding would have been different.” Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. “A reasonable probability means a probability sufficient to undermine confidence in the outcome.” Id. Failure to satisfy either prong results in the denial of relief. Id. at 697, 104 S. Ct. at 2069.

We agree with the post-conviction’s assessment that the crux of the petitioner’s defense at trial and at the post-conviction hearing all centers around his mistaken belief that the certified birth certificate admitted at his trial was a forgery. Likewise, the same holds true from what this court can discern from his appellate brief. The proof at the evidentiary hearing refutes any claim of a forged birth certificate. Also, it is clear that trial counsel fully investigated and challenged the veracity of the birth certificate through any and all appropriate means. This court also concludes that trial counsel competently interviewed potential witnesses but had little success in finding either favorable testimony or willing witnesses. Despite all evidence to the contrary, the petitioner still maintains that the victim was over the age of thirteen at the time of the offenses, that she consented to a sexual relationship with him and that the birth certificate was fake. The post-conviction court found that trial counsel acted above the level of competence required in representing the petitioner and that the petitioner had failed to prove his allegations on post-conviction by clear and convincing evidence. After a full and thorough review of all of the pro se pleadings, the transcript of the evidentiary hearing and the appellate briefs in this case, we agree and conclude that the evidence does not preponderate these findings. Therefore, the denial of post-conviction relief is affirmed.

CONCLUSION

The evidence does not preponderate against the post-conviction court’s findings. The judgment denying post-conviction relief is affirmed.

D. KELLY THOMAS, JR., JUDGE